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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

MARVIN MAXWELL, MAJOR, OKLAHOMA CITY POLICE DEPARTMENT, et al.,

Cross-Petitioners,

v.

RAYMON J. MELTON,

Respondent.

Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

JAMES G. HAMILL
Municipal Counselor
*RICHARD C. SMITH
Assistant Municipal Counselor
309 Municipal Building
200 North Walker
Oklahoma City, Oklahoma 73102
(405) 297-2451

Attorneys for Cross-Petitioners Emmett, deceased, Maxwell, Chambless, Taylor and Hearn

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS FOR REVIEW

1. Should this Court grant certiorari as part of its supervisory authority over lower courts to correct conflicting decisions of the Tenth Circuit Court of Appeals which conflict with a decision of this Court?

2. Should this Court grant certiorari as part of its supervisory authority over lower courts to correct the denial of qualified immunity to these Cross-petitioners?

3. Should this Court grant certiorari to resolve a conflict in the circuit courts regarding the issue of whether members of a police disciplinary board who lack the authority to discharge an employee may be held individually liable for deprivations of property and/or liberty or if such termination is in violation of the First Amendment?

PARTIES

The participants in the proceedings below were:

Raymon J. Melton, Plaintiff

City of Oklahoma City, a municipal corporation; Lloyd A. Gramling, Chief of Police for The City of Oklahoma City; Gerald L. Emmett, deceased, Former Assistant Chief of Police for The City of Oklahoma City; Marvin Maxwell, Major, Oklahoma City Police Department; William R. Chambless, Major, Oklahoma City Police Department; Carl Smith, Lieutenant, Oklahoma City Police Department; Robert Taylor, Lieutenant, Oklahoma City Police Department; David McBride, Lieutenant, Oklahoma City Police Department; and Paula Hearn, Assistant to The City Manager, Defendant.

Oklahoma Municipal League, Inc. amicus curiae

TABLE OF CONTENTS

Page

QUESTIONS FOR REVIEW i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 3

STATEMENT OF THE CASE 6

A. THE PROCEEDINGS BELOW 6

STATEMENT OF FACTS 8

REASONS FOR GRANTING THE WRIT 12

SHOULD THIS COURT GRANT CERTIORARI AS PART OF ITS SUPERVISORY AUTHORITY OVER LOWER COURTS TO CORRECT CONFLICTING DECISIONS OF THE TENTH CIRCUIT COURT OF APPEALS WHICH CONFLICT WITH AN OPINION OF THIS COURT? 13

SHOULD THIS COURT GRANT CERTIORARI AS PART OF ITS SUPERVISORY AUTHORITY OVER LOWER COURTS TO CORRECT THE DENIAL OF QUALIFIED IMMUNITY TO THESE CROSS-PETITIONERS 16

STANDARD FOR QUALIFIED IMMUNITY 16

TABLE OF CONTENTS – Continued

Page

A. PROPERTY INTEREST..... 18

B. LIBERTY INTEREST 20

SHOULD THIS COURT GRANT CERTIORARI TO RESOLVE A CONFLICT IN THE CIRCUITS REGARDING THE ISSUE OF WHETHER MEMBERS OF A POLICE DISCIPLINARY BOARD WHO LACK THE AUTHORITY TO DISCHARGE AN EMPLOYEE MAY BE HELD INDIVIDUALLY LIABLE FOR DEPRIVATIONS OF PROPERTY AND/OR LIBERTY OR IN VIOLATION OF THE FIRST AMENDMENT 20

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Bailey v. Kirk, 777 F.2d 567 (10th Cir. 1985) 18

Board of Regents v. Roth, 408 U.S. 546 (1972) 12, 18

Bowen v. Watkins, 669 F.2d 979 (5th Cir. 1982) 21

Brady v. Maryland, 373 U.S. 83 (1963) 9

Codd v. Velger, 429 U.S. 624 (1977) 12, 20

Connick v. Myers, 461 U.S. 138 (1983) 12, 16

Creighton v. Anderson, 483 U.S. 635 (1987) 13, 16

Graham v. City of Oklahoma City, 859 F.2d 142 (10th Cir. 1988) 7

Hall v. O'Keefe, 617 P.2d 196 (Okla. 1980) 18

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 12, 13, 17

Loudermill v. Cleveland Board of Education, 470 U.S. 532 (1985) 19

Missouri v. Jenkins, 491 U.S. 274 (1989) 2

Mitchell v. Forsyth, 472 U.S. 511 (1985) 13

Neubauer v. City of McAllen, 766 F.2d 1567 (5th Cir. 1985) 21

Reimer v. Smith, 663 F.2d 1316 (5th Cir. 1981) 21

Rosewitz v. Latting, 689 F.2d 175 (10th Cir. 1982) 19

Ulmholtz v. City of Tulsa, 565 P.2d 15 (Okla. 1977) 18

Wheeler v. Cosden Oil and Chemical Co., 744 F.2d 1131 (5th Cir. 1984) 22

Zinermon v. Burch, 494 U.S. 113 (1990) 20

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION

1st Amendment 3, 6, 8, 15

5th Amendment 19

14th Amendment 3, 19

CHARTER OF THE CITY OF OKLAHOMA CITY

ARTICLE III Section 1 ..... 4, 18

ARTICLE IV Section 3 ..... 4, 18

OKLAHOMA STATUTE

11 Okla. Stat. 50-125 4

FEDERAL STATUTES

28 U.S.C. Sec. 1254(i) 2

42 U.S.C. Sec. 1983 ..... 3, 6, 21

MISCELLANEOUS

Rule 12.3 of the Rules of the Supreme Court of the United States 2

Rule 13.4 of the Rules of the Supreme Court of the United States 2

Former Rule 20.4 of the Rules of the Supreme Court of the United States 2

Rule 35(b) of the Rules of Appellate Procedure 2

S. Nahmod, Civil Rights & Civil Liberties Litigation 21

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October Term, 1991

CITY OF OKLAHOMA CITY, et al.,

Cross-Petitioners,

v.

RAYMON J. MELTON,

Respondent.

Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

Cross-petitioners Gerald Emmett, deceased, Marvin Maxwell, William R. Chambless, Robert Taylor and Paula Hearn respectfully pray that if this Court were to grant Petitioner R. J. Melton's Petition for Writ of Certiorari, it also grant Cross-petitioners' Petition for Writ of Certiorari to review the Judgment of the three-judge Panel of the Tenth Circuit Court of Appeals entered in this proceeding on June 21, 1989.

OPINIONS BELOW

The decision of the three-judge Panel is reported at 879 F.2d 706 (10th Cir. 1989) and is contained in Melton's

Appendix at pages 53-136. Cross-petitioners' Petition for Rehearing was denied at 888 F.2d 724 (10th Cir. 1989) and is contained in Melton's Appendix at pages 50-52; however, a majority of the Judges of the Tenth Circuit Court of Appeals voted to rehear a portion of this case. Their decision, which is reported at 928 F.2d 920 (10th Cir. 1991), is contained in Melton's Appendix at pages 1-49, and is in conflict with the holdings of the three-judge Panel in several crucial areas.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(i). Cross-petitioners rely on Rule 12.3 of the Rules of this Court for the filing of this cross-petition. Respondent's Petition for Writ of Certiorari was received on July 5, 1991.

(There may be a jurisdictional defect in this case. This Court's review of the Panel's decision may be barred by the 1990 revision of Former Rule 20.4 of the Rules of the Supreme Court presently found at Rule 13.4. At the time of the denial of the Petition for rehearing, former Rule 20.4 did not state that a Rule 35(b) rehearing did not extend the time for the filing of the Petition for Certiorari as is presently stated in Rule 13.4. *But see Missouri v. Jenkins*, 491 U.S. 274 (1989). See Other Jurisdictional Issues in Respondents' Brief in Opposition to Petition for Certiorari filed herein in No. 91-29.)

STATUTES INVOLVED

This case involves the First Amendment to the Constitution of the United States which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

This case involves Section 1 of the 14th Amendment to the Constitution of the United States which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves 42 U.S.C. Sec. 1983 which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Colombia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia

> shall be considered to be a statute of the District of Columbia.

This case also involves 11 Okla. Stat. 50-125 which provides:

> Members retired under the provisions of this article may retain their status as peace officers of the State of Oklahoma, retired, and as such may retain the right to keep and bear firearms when approved by the officials of the municipality of retirement. Such retired members may in times of great emergency or danger serve in keeping with their availability and ability at the request of the Governor of Oklahoma or the mayor of their retirement municipality.

Lastly, this case involves two sections of the Charter of The City of Oklahoma City which provide:

> ARTICLE III.
>
> Section 1. Appointments and Promotions.
>
> Appointments and promotions in the classified service of the City shall be made according to merit and fitness, and removals and demotions shall be made solely for the good of the service. To carry out this purpose, there is hereby created a Personnel Service Department, the head of which shall be the Personnel Director who shall be appointed by the City Manager and is subject to removal by the Manager. . . .
>
> ARTICLE IV.
>
> Section 3. The City Manager. The City Manager shall:
>
> (a) Be the Chief Administrative Officer of the City and shall have charge and supervision of all branches of the City service, except as otherwise in this Charter provided.

(b) See to the faithful execution of all laws and ordinances of the State and City.

(c) Appoint all officers and employees of The City of Oklahoma City except the elective officers and the officers whose election is vested in the Council by this Charter.

(d) Dismiss any officer or employee appointed by him whenever, in his judgment, the interests of the City service so require.

(e) Control, supervise and direct the several officers, boards, and departments of the City which are within and under his control and management.

(f) At any time investigate the affairs of any department. He, or any person appointed by him for that purpose, shall have power to compel the attendance of witnesses and the production of books, papers and other evidence.

(g) Attend all meetings of the Council and may take part in the discussions, but shall not vote.

(h) Keep the Council advised of all the needs of the City and shall recommend measures for adoption.

(i) Prepare and submit to the Council, annually during the month of July, an estimate in detail of the probable receipts and the expenditures of funds and needs of the City in its operation for the ensuing fiscal year.

(j) Perform all such other duties as may be imposed on him by this Charter or by the Council.

STATEMENT OF THE CASE

A. The Proceedings Below:

This case involves claims by a former Oklahoma City employee (police officer) arising from his discharge in September, 1983. On January 9, 1984, he initiated a suit in the United States District Court for the Western District of Oklahoma under 42 U.S.C. Sec. 1983, alleging, *inter alia*, that he had been (a) deprived of a property interest in continued employment without due process of law; (b) deprived of liberty without due process of law, and (c) terminated in violation of his First Amendment rights. On February 4, 1985, following a jury trial, a verdict was entered in favor of Petitioner, and against all the defendants except one, in excess of $1.2 million.

On appeal, the Tenth Circuit Court of Appeals issued its Panel decision which held, *inter alia*, that Melton's First Amendment rights were violated; that he had a protected property right in "retirement" status (i.e. the right to wear his uniform) and did not receive a hearing prior to its deprivation; that he had a property right in continued employment but that the procedures employed by the City prior to his termination complied with due process; and that his liberty interest was violated by his termination and by publication of a charge lodged by the FBI but not considered by the City or these individuals in their decision to recommend termination of his employment with the City. The Panel further held that these Cross-petitioners were not entitled to qualified immunity excepting on a portion of Melton's First Amendment claims. The Panel remanded the case for retrial on whether the trial testimony of Melton was a motivating

factor in his termination. It is interesting to note that the Panel, contrary to the Court Reporter's notes and the Trial Transcript (*See* Cross-petitioners' Appendix at 12-13.), held that The City Charter (which has been interpreted by another Panel of the Tenth Circuit Court of Appeals in *Graham v. City of Oklahoma City*, 859 F.2d 142 (10th Cir. 1988) as *not* creating a property right in continued employment) had not been introduced, and further, the Panel refused to consider it even though the majority took judicial notice of the Charter on the issue of municipal liability on Melton's liberty claim. The Panel also held that Melton's activities in tape recording a conversation with an Assistant United States Attorney and turning it over to defense counsel was a matter of public concern. The Panel decision affirmed the jury verdict against these Cross-petitioners on Melton's liberty interest claim. The Panel did not address the Cross-petitioners' argument that their actions were not the proximate cause of Melton's alleged injuries as they did not terminate Melton's employment nor did they publish any material.

Cross-petitioners filed a Petition for Rehearing with a suggestion of hearing in *banc*. The Tenth Circuit Court of Appeals denied the Petition for Rehearing, but issued an order for a hearing in *banc* which directed the parties to address four (4) specific issues.

On March 19, 1991, the Tenth Circuit issued the in *banc* decision. This decision reversed the earlier Panel decision with respect to the liberty interest claim, and directed entry of judgment for all the Defendants on that claim.

This opinion also held, that "for reasons of his own, Mr. Melton surreptitiously recorded his conversation

with the prosecutor and later gave the recording to counsel for Mr. Page" (Petitioner's Appendix at 3), and that "following the hearing, the Board, with one member dissenting, concluded Mr. Melton had violated the Code of Ethics by recording and disclosing to Mr. Page's counsel the contents of Mr. Melton's conversation with the federal prosecutor." Petitioner's Appendix at 9-10.

These findings are contrary to the Panel's decision on Melton's First Amendment claim and would entitle Cross-petitioners to judgment on the remaining First Amendment claim of Melton.

STATEMENT OF FACTS

Raymon J. Melton was employed as a police officer by The City of Oklahoma City. A friend of his, Judge Page, was indicted by a federal grand jury on criminal charges. While the federal charges against Judge Page were proceeding toward trial, Melton went to the federal courthouse for an interview about Judge Page with the Assistant United States Attorney who was handling the federal prosecution of Judge Page. Melton surreptitiously tape recorded this interview. Carrying a tape recorder into Federal Courthouse is a violation of the local court rules. The very judge who instructed the jury in this trial that there is nothing wrong with tape recording any conversation, had entered the Order barring tape recorders from the Courthouse. Melton later turned the tape over to the defense attorneys for the indicted and later convicted judge.

The convicted judge's attorneys unsuccessfully asserted that the taped conversation included *Brady* material which the federal prosecutor had failed to disclose to the judge's lawyers. The Trial Court, in the criminal case, held that this information was not *Brady* material. After the criminal trial, a special agent for the FBI complained to Lloyd A. Gramling, then the Chief of Police of the Oklahoma City Police Department, about Melton's secretly taping the interview and turning the tape over to the defense attorneys for the judge. The FBI Special Agent also asserted that Melton committed perjury in his testimony during the federal court trial of the judge.

Chief Gramling ordered an Internal Affairs investigation to be made into the complaints made by the FBI agent about Melton. Lieutenant Carl Smith was directed to conduct the Internal Affairs investigation. Melton was provided with the following written notice in August, 1983:

TO: Lieutenant R.J. Melton DATE: August 17, 1983

FROM: Lt. Carl Smith SUBJECT: Allegations
Internal Affairs Unit by the F.B.I.

This letter is to inform you that this office has been instructed by the Chief's Office to conduct an investigation into allegations made against you by Special Agent Ron West of the Federal Bureau of Investigation.

You are specifically accused of violating the Police Code of Ethics, section 1.01 of the Oklahoma City Police Department Operations Manual, by revealing details of a confidential discussion between you and Assistant U.S. Attorney Wes Fredenburg to the defense counsel

of William C. Page, who was subsequently convicted of racketeering, thereby aiding his defense.

You are also accused of making perjured statements both in a sworn affidavit on a motion to dismiss filed by defense counsel, and during testimony you gave from the witness stand during the trial.

You will be contacted in the near future concerning a date and time for us to discuss these allegations with you. If you have any questions, feel free to contact me at 946-4421.

Carl Smith, Lieutenant
Internal Affairs
(Plaintiff's Exhibit 48)

Melton responded to both charges during his interview with Lieutenant Smith. Melton freely admitted that he had secretly taped the interview with the federal prosecutor and later turned the tape over to the defense attorneys representing Judge Page. He denied committing perjury.

Written notice was given to Melton on September 8, 1983, by Cross-petitioner Gerald L. Emmett, deceased, then Assistant Chief of Police, that a Departmental Review Board would convene on September 13, 1983, as a result of the Internal Affairs investigation, about which plaintiff had been previously advised, and that Melton was scheduled to appear before the board at 9:00 a.m. Melton did not request any delay in the scheduled hearing.

Also on this day, articles appeared in both local daily newspapers. No evidence, and indeed no allegation has

ever been made that *any* of *these* Cross-Petitioners discussed any aspect of the charges or Melton's dismissal with the press or that they otherwise published the dismissal. The Departmental Review Board, consisting of seven persons, was convened as scheduled. This board included: Gerald L. Emmett, now deceased, then the Assistant Chief of Police as Chairman; Police Majors W.R. Chambless and Marvin Maxwell; Police Lieutenants Robert Taylor and Ted Pollock; Senior Police Officer John Clark, sitting as the representative of the Fraternal Order of Police (F.O.P.), the Petitioner's collective bargaining agent; and Paula Hearn, Assistant to the City Manager.

The Chairman determined and advised the Board after it convened that it would not consider the allegation of perjury, but would only deal with the alleged breach of the Code of Ethics. Melton was advised by the Chairman that the hearing would not involve, and the Board would not consider, the allegation of perjury.

Melton appeared before the Board without objection to the time or subject matter of the proceeding. In response to the Chairman's opening remarks, Melton stated that he understood the allegations made against him and the charge that such conduct violated the Code of Ethics. Melton admitted to the Board that he had secretly taped his interview with the federal prosecutor and later turned a copy of the tape over to the convicted judge's lawyers.

The Board members voted six to one to sustain the charge that Melton had committed a serious violation of the Code of Ethics by secretly taping the interview he had with the federal prosecutor and turning the tape over to

the convicted judge's attorneys. Senior Officer John Clark, the F.O.P. representative, voted not to sustain the charged violation of the Code of Ethics. The Board then voted on discipline and recommended, by a 5 to 2 vote, that Melton be terminated.

The Board's findings and recommendation were furnished to Chief Gramling. After consulting with the City Manager, and after getting his approval, the Chief then informed Melton in a letter dated September 13, 1983, that his employment with the City was terminated. Melton was allowed to retire to collect his pension.

Several other articles and editorials appeared during and after Melton's dismissal. These Cross-petitioners were not quoted in those articles nor has any evidence been offered that they published the charges in any manner.

REASONS FOR GRANTING THE WRIT

Cross-petitioners would urge that this Court, under its supervisory powers over the lower courts, grant the Petition to correct the inconsistencies in the decisions in the Tenth Circuit (Issue No. 1, conflicting decisions) and to correct the conflict with this Court's decision in *Connick v. Myers*, 461 U.S. 138 (1983).

Cross-petitioners would urge this Court to grant the Petition on issue No. 2 (qualified immunity) as the Panel's opinion is in conflict with this Court's decisions in *Board of Regents v. Roth*, 408 U.S. 546 (1972); *Codd v. Velger*, 429 U.S. 624 (1977); *Harlow v. Fitzgerald*, 457 U.S.

800 (1982); *Creighton v. Anderson*, 483 U.S. 635 (1987); and *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

On issue No. 3 (causation), Cross-petitioners would urge that this Court grant certiorari on the issue to resolve a conflict in the various Circuits. If this Court were not to grant this Cross-petition, any person who sits on any advisory disciplinary review board could be held liable for any alleged unconstitutional act, even if they were not responsible for such act.

SHOULD THIS COURT GRANT CERTIORARI AS PART OF ITS SUPERVISORY AUTHORITY OVER LOWER COURTS TO CORRECT CONFLICTING DECISIONS OF THE TENTH CIRCUIT COURT OF APPEALS WHICH CONFLICT WITH AN OPINION OF THIS COURT?

The Panel's opinion (and the Judgment entered March 19, 1991) remands this case for retrial against these Cross-petitioners on the issue of an alleged First Amendment violation, namely on Mr. Melton's:

> claim that his trial testimony was a substantial or motivating factor in his dismissal from the Oklahoma City Police Department. If on retrial the jury so finds, the individual defendants *will not* be shielded by *Harlow* from personal liability for any damages which may be awarded on that basis.

Petitioner's Appendix at 103 (emphasis in original).

The majority in the Panel's decision attempted to justify their holding by stating:

> Throughout the trial, defendants repeatedly denied that Mr. Melton's testimony in the Page

> trial was in any way related to his dismissal. However, Mr. Melton presented evidence, albeit circumstantial, that his testimony may have been a substantial or motivating factor in his dismissal. Specifically he introduced testimony by the only other police officer (Captain Schimmels) who testified at the Page trial. Like Mr. Melton, that individual too was subjected to an Internal Affairs investigation shortly after his testimony. Eventually the other officer chose involuntary retirement rather than risk losing his retirement benefits if he were fired. From this evidence the jury *could* have determined that Mr. Melton's trial testimony was indeed a substantial or motivating factor in his dismissal, notwithstanding defendants' disavowal of that fact.

Petitioner's Appendix at 69 (emphasis in original).

Petitioner failed to offer any evidence that the Board Members had anything to do with the Internal Affairs investigation into Captain Schimmels or his retirement. Indeed, Schimmels retired before any Departmental Review Board could be convened. Additionally, the make-up of the board would be different due to difference in the ranks of Schimmels and Melton. Judge Baldock in his dissent to the Panel's decision stated:

> Accepting the propriety of the court's conclusion that Melton's trial testimony was a matter of public concern which outweighed Oklahoma City's interest in the effective functioning of its police department, the record contains evidence insufficient for any reasonable jury to conclude that Melton's trial testimony was the "motivating factor" or cause for his discharge . . . Gramling testified that Melton could not be terminated for testifying at Page's trial. Rec. vol. XIV, at 877. Melton's expert, Dr.

> George Kirkham, testified that the action taken against Melton was not based on his appearance as a trial witness. *Id.* Vol XI, at 554-55. Furthermore, the testimony of Melton himself along with members of the review board unequivocally indicates that Melton's appearance on behalf of Judge Page had nothing to do with his discharge. *E.g., id.* vol X, at 253, vol. XIII, at 746, 829.

Petitioner's Appendix at 118-19.

Cross-petitioners acknowledge that the First Amendment includes the right of a person to testify at trial; however, as the in *banc* Court held:

> Following the hearing, the Board, with one member dissenting, concluded Mr. Melton had violated the Code of Ethics by recording and disclosing to Mr. Page's counsel the contents of Mr. Melton's conversation with the federal prosecutor.

Petitioner's Appendix at 9-10.

The in *banc* Court's opinion further held that:

> For reasons of his own, Mr. Melton surreptitiously recorded his conversation with the prosecutor and later gave the recording to counsel for Mr. Page.

Petitioner's Appendix at 3.

Thus, the Court in *banc* has held that the Board recommended Melton be terminated for the taping and turning over conduct, which was motivated purely for personal reasons. Since Petitioner's "speech" was not a matter of public concern, these Cross-petitioners were entitled to Judgment on the First Amendment claim

under *Connick v. Myers*, 461 U.S. 138 (1983). As the opinions now stand, however, they are to once again face trial on this issue.

SHOULD THIS COURT GRANT CERTIORARI AS PART OF ITS SUPERVISORY AUTHORITY OVER LOWER COURTS TO CORRECT THE DENIAL OF QUALIFIED IMMUNITY TO THESE CROSS-PETITIONERS?

As the Panel recognized, the trial judge erroneously submitted the issue of qualified "good faith" immunity to the jury. Petitioner's Appendix at 93. Jury Instruction No. 8, on good faith, also failed to define clearly established law. *See* Cross-petitioners' Appendix at 10-11. Instruction No. 6 attempted to define when a property interest required a hearing prior to its deprivation. *See* Cross-petitioners' Appendix at 6-7. Instruction No. 7 attempted to define liberty interests. *See* Cross-petitioners' Appendix at 8-9. All these instructions were erroneous. The panel reviewed the evidence *de novo* to determine if these Cross-petitioners were entitled to qualified immunity. Cross-petitioners, for reasons discussed below, will show that those determinations were contrary to this Court's decisions.

STANDARD FOR QUALIFIED IMMUNITY

In *Creighton v. Anderson*, 483 U.S. 635 (1987), this Court reviewed earlier cases on qualified immunity and succinctly stated their holdings at 638-639:

> Our cases have accommodated these conflicting concerns by generally providing government

> officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated. See, e.g., Malley v. Briggs, 475 US 335, 341, 89 L Ed 2d 271,106 S Ct 1092 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law"); id., at 344-345, 89 L Ed 2d 271, 106 S Ct 1092 (police officers applying for warrants are immune if a reasonable officer could have believed that there was probable cause to support the application); Mitchell v. Forsyth, 472 US 511, 528, 86 L Ed 2d 411, 105 S Ct 2806 (1985) (officials are immune unless "the law clearly proscribed the actions" they took); Davis v. Scherer, 468 US 183, 191, 82 L Ed 2d 139, 104 S Ct 3012 (1984); id., at 198, 82 L-Ed 2d 139, 104 S Ct 3012. (Brennan, J., concurring in part and dissenting in part); Harlow v. Fitzgerald, supra, at 819, 73 L Ed 2d 396, 102 S Ct 2727. Cf., e.g., Procunier v. Navarette, 434 US 555, 562, 55 L Ed 2d 24, 98 S Ct 855 (1978). Somewhat more concretely, whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action, Harlow, 457 US, at 819, 73 L Ed 2d 396, 102 S Ct 2727, assessed in light of the legal rules that were "clearly established" at the time it was taken, id., at 818, 73 L Ed 2d 396, 102 S Ct 2727.

Thus, these Cross-petitioners are entitled to judgment as a matter of law if their actions on September 13, 1983, were objectively reasonable under the clearly established law at that time.

A. PROPERTY INTEREST

In order to have a constitutionally protected property interest, one must be able to demonstrate a legitimate claim of entitlement to the interest. A need for the benefit, an expectation of retaining the benefit or a desire to retain a benefit, such as employment, will *not* create a constitutional property interest. *Board of Regents v. Roth*, 408 U.S. 546 (1972).

The Oklahoma City Charter, Article III, Section 1, provides that the removal of a classified employee " . . . shall be solely for the *good of the service.*" (Emphasis added.) Article IV, Section 3(d) provides that the City Manager shall "dismiss any officer or employee appointed by him whenever, *in his judgment, the interests of the City service so require.*" (Emphasis added.) In *Hall v. O'Keefe*, 617 P.2d 196 (Okla. 1980), a police chief and a police lieutenant were terminated under language authorizing removal of employees "where necessary for the good of the service," or "solely for the good of the service." *Id.* at 199 n. 6. The Oklahoma Supreme Court held that such language did not create a constitutionally protected interest in the employment. *Hall*, at 199, 200. In *Bailey v. Kirk*, 777 F.2d 567 (10th Cir. 1985), the Tenth Circuit Court of Appeals recognized the distinction in "cause" language of a Charter, which created a property interest, and "solely for the good of the service" language in a Charter which did not create such an interest. *Id.* at 574. The language of the Charter of The City of Oklahoma City does not create a protected interest. In *Ulmholtz v. City of Tulsa*, 565 P.2d 15 (Okla. 1977), the Oklahoma Supreme Court held that such a Charter provision could not be modified by a policy manual.

Even if the Petitioner had a property right, the Tenth Circuit Court of Appeals in *Rosewitz v. Latting*, 689 F.2d 175 (10th Cir. 1982) had held that The City of Oklahoma City's grievance procedures satisfied due process. The *Rosewitz* decision was given to the trial judge during the trial of this case. (TR pages 576, 946). These Cross-petitioners were entitled to rely upon the *Rosewitz* case in that the procedures supplied to Melton had been determined to be in conformance with the Fifth and Fourteenth Amendments. The law was clearly established that the City's procedures were valid. The Board was advisory in nature. The Board recommended termination. The Chief of Police sought the City Manager's approval, and concurred with the Board's recommendation. He, later, allowed Petitioner to retire. (The disciplinary procedures for police employees included an extra hearing in addition to those approved in *Rosewitz*. Even without filing a grievance, the police employee has a pre-termination board hearing. *Rosewitz* approved, as sufficient due process, the City's post-termination grievance review board.)

Even though Melton had no property right, he was given notice and an opportunity to be heard in accordance with *Loudermill v. Cleveland Board of Education*, 470 U.S. 532 (1985).

As the panel held, these Cross-petitioners had nothing to do with Petitioner's denial of the alleged right to wear a police uniform. (Petitioner's Appendix at 78 n. 19.)

As a matter of law, Cross-petitioners were entitled to Judgment on the property issue.

B. LIBERTY INTEREST

These Cross-petitioners would submit that the best argument they could make that Petitioner had no "clearly established" right to a name clearing hearing, is the fact that the judges of the Tenth Circuit Court of Appeals cannot agree whether a hearing was required. If those judges cannot, how can the members of a police disciplinary board who are not lawyers?

In any event, the City's procedures satisfied due process for a property deprivation, Melton's Appendix at 75, and must therefore satisfy due process for a liberty deprivation. *Zinermon v. Burch*, 494 U.S. 113 (1990). The Petitioner further failed to show that the published material was false or that the reason for his termination was false, and the Board Members should be entitled to Judgment under *Codd v. Velger*, 429 U.S. 624 (1977).

SHOULD THIS COURT GRANT CERTIORARI TO RESOLVE A CONFLICT IN THE CIRCUITS REGARDING THE ISSUE OF WHETHER MEMBERS OF A POLICE DISCIPLINARY BOARD WHO LACK THE AUTHORITY TO DISCHARGE AN EMPLOYEE MAY BE HELD INDIVIDUALLY LIABLE FOR DEPRIVATIONS OF PROPERTY AND/OR LIBERTY OR IN VIOLATION OF THE FIRST AMENDMENT?

The Oklahoma City Police Department Departmental Review Board serves as a fact-finding and *recommending* body. The uncontroverted evidence indicated that the Board, in accordance with agreed-to and adopted policies, heard and reviewed evidence, made findings of fact, and made recommendations of possible discipline. Their

decisions were based on their discretionary authority under these policies. No evidence was ever offered that they diverted from the City's policies in holding this hearing. No evidence was introduced to show that members of the Board exceeded their authority. The actual action to terminate was taken by the Chief of Police and City Manager as is required by policies, the Charter, State law, and the Collective Bargaining Agreement.

It is the City Manager who alone possesses the power and authority under the Charter to cause Petitioner's termination. The Chief of Police and the City Manager were not bound by the recommendation of the Board. In *Neubauer v. City of McAllen*, 766 F.2d 1567 (5th Cir. 1985), the Court found that the City Manager, under a provision similar to the present case, was the sole official with authority to cause a termination. *Id.* at 1573. "Absent evidence that the recommending Board individuals caused the City Manager's action or that his decision might not otherwise be made, there is no liability on the part of the recommending body or its individual members." *Id.* at 1577 n. 11, citing *Reimer v. Smith*, 663 F.2d 1316 (5th Cir. 1981) which stated at page 1322 n.4 "It is axiomatic that a plaintiff cannot succeed in a § 1983 action if he fails to demonstrate a causal connection between the state official's alleged wrongful action and his deprivation of life, liberty, or property."; *Bowen v. Watkins*, 669 F.2d 979 (5th Cir. 1982) which stated at page 985 "Liability under § 1983 requires causation, and a single vote is not a cause when the same decision would have been reached without that vote."; *S. Nahmod, Civil Rights & Civil Liberties Litigation* § 3.15, (1979) which states at page 86 "[T]he very language of 1983 requires a

causal relation between defendant's conduct and plaintiff's constitutional deprivation."

An intervening and effective action between the Board's recommendation, such as the Manager's decision to terminate Petitioner, even if the recommendation was maliciously made, breaks any causal chain and insulates the recommending party from any constitutional violation that might result by reason of the termination. *Wheeler v. Cosden Oil and Chemical Co.*, 744 F.2d 1131 (5th Cir. 1984).

The Board could not terminate the Petitioner's employment with the City. They did not release any information to the press. Their actions were not the direct or proximate cause of plaintiff's "injuries".

CONCLUSION

For reasons cited herein, Cross-petitioners would urge this Court to grant their Petition for Writ of Certiorari if Melton's Petition for Writ of Certiorari is granted.

Respectfully submitted,

JAMES G. HAMILL
Municipal Counselor
*RICHARD C. SMITH
Assistant Municipal Counselor
309 Municipal Building
200 North Walker
Oklahoma City, Oklahoma 73102
(405) 297-2451

Attorneys for Cross-Petitioners Emmett, deceased, Maxwell, Chambless, Taylor and Hearn

*Counsel of Record

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(2)

No. 91-280

In The

Supreme Court of the United States

October Term, 1991

MARVIN MAXWELL, MAJOR, OKLAHOMA CITY POLICE DEPARTMENT, et al.,

Cross-Petitioners,

v.

RAYMON J. MELTON,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO CROSS PETITION FILED BY MARVIN MAXWELL, MAJOR, OKLAHOMA CITY POLICE DEPARTMENT, et al.

*Steven M. Angel
Law Offices of Steven M. Angel
50 Penn Place, Suite 825
Oklahoma City, OK 73118
(405) 848-0286

Carl D. Hughes
Hughes & Nelson
5801 N. Broadway Ext.
Suite 302
Oklahoma City, OK 73118
(405) 848-0111

Attorneys for Respondent

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

1. Do cross petitioners raise any issues which are appropriate for consideration by certiorari.

PARTIES

The participants in the proceedings below were:

Raymon J. Melton, Plaintiff

City of Oklahoma City, a municipal corporation; Lloyd A. Gramling, Chief of Police for the City of Oklahoma City; Gerald L. Emmett, Assistant Chief of Police for the City of Oklahoma City; Marvin Maxwell, Major, Oklahoma City Police Department; William R. Chambless, Major, Oklahoma City Police Department; Carl Smith, Lieutenant, Oklahoma City Police Department; Robert Taylor, Lieutenant, Oklahoma City Police Department; David McBride, Lieutenant, Oklahoma City Police Department; and Paula Hearn, Assistant to the City Manager, Defendants

Oklahoma Municipal League, Inc. amicus curiae[1]

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[1] The corporations noted are public corporations with no known subsidiaries of which petitioner is aware.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE WRIT	4
THE CROSS PETITIONERS CITE NO BASIS FOR GRANTING CERTIORARI OVER PLAINTIFF'S FIRST AMENDMENT CLAIMS	4
THE CROSS PETITIONERS RAISE NO ISSUE WITH RESPECT TO QUALIFIED IMMUNITY WHICH WOULD JUSTIFY GRANTING THE CROSS PETITION FOR WRIT OF CERTIORARI	4
THE CROSS PETITIONERS HAVE NOT ASSERTED ANY BASIS TO GRANT THE CROSS PETITION ON THE ISSUE OF CAUSATION	6
CONCLUSION	7

TABLE OF AUTHORITIES

Page

CASES:

McClelland v. Facteau, 610 F.2d 693 (10th Cir. 1979) 6

Rizzo v. Goode, 423 U.S. 362 (1976) 6

Turpin v. Mailet, 619 F.2d 196 (2nd Cir. 1980), *cert denied* 449 U.S. 1016 (1980) 6

OTHER AUTHORITIES:

First Amendment to the Constitution of the United States 2, 4, 5

Fourteenth Amendment to the Constitution of the United States 2, 3

28 U.S.C. Sec. 1254(1) 2

42 U.S.C. Sec. 1983 3

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Respondent herein, Raymon J. Melton[2], respectfully prays that the court deny the cross petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

[2] Petitioner in Case No. 91-29, and respondent in case nos. 91-280, 91-281, 91-304.

OPINIONS BELOW

The en banc opinion of the Tenth Circuit is reported at 928 F.2d 920[3]. This decision was entered after an order granting a hearing en banc on four (4) specific issues. This order is reported at 888 F.2d 724, and is set out at App. pp. 50-52. The panel decision of the Tenth Circuit is reported at 879 F.2d 706 as *Melton v. City of Oklahoma City,* and is set out at App. pp. 53-136.

JURISDICTION

The decision of the Tenth Circuit was entered on March 1991. This court granted an extension to file the instant petition for writ of certiorari until July 2, 1991, on which date the petition was filed. The respondent filed it's cross petition for writ of certiorari on August 5, 1991. The corrected petition was received by the petitioners on August 26, 1991. Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

This case involves the provisions of the First and 14th Amendments to the Constitution of the United States. The First Amendment provides:

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[3] A copy of this opinion is included at App. 1 of Petitioner's Appendix to the petition in Case No. 91-29. Hereinafter, reference to the appendix to Case No. 91-29 shall be referred to as App. ___.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The 14th Amendment provides as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

These provisions are implemented by 42 U.S.C. Sec. 1983 which provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects or causes to be subjected any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

As noted above, the cross-petitioner's application for a writ of certiorari is one of four pending cases. The factual background to this case is clearly set forth in the

petition for certiorari filed by Raymon J. Melton in Case No. 91-29.

REASONS FOR DENYING THE WRIT

THE CROSS PETITIONERS CITE NO BASIS FOR GRANTING CERTIORARI OVER PLAINTIFF'S FIRST AMENDMENT CLAIMS

With respect to the First Amendment claim, the Tenth Circuit bifurcated plaintiff's theories. That is, the Tenth Circuit made distinctions in the causes of action regarding the plaintiff's First Amendment claims. They recognized two separate protected activities. The first was the right to testify at trial. The second was the right to communicate with defense counsel.

The court remanded the first issue, relating to the claim of testifying at trial, for the purpose of properly instructing the jury. This issue was sc well established that the court determined that good faith immunity would not apply to the defendants with regard to this claim.

With respect to the second issue, relating to communicating with defense counsel, the court below affirmed the verdict as against the City of Oklahoma City. The court ruled that qualified immunity applied to the claims against them in their individual capacities.

Cross petitioners' first basis for this court granting the writ is that the court erred in remanding this case against these individual defendants on the trial testimony

issue[4]. They urge that the evidence does not support such a claim. However, as the court below noted, there is sufficient evidence to justify submitting this matter to a jury. In this regard, the panel below noted that this was an appropriate issue for the jury, App. p. 67-68.

Accordingly, the cross petitioners fail to identify any basis for this court granting the extraordinary writ of certiorari. Accordingly, the petition should be denied.

THE CROSS PETITIONERS RAISE NO ISSUE WITH RESPECT TO QUALIFIED IMMUNITY WHICH WOULD JUSTIFY GRANTING THE CROSS PETITION FOR WRIT OF CERTIORARI

Cross petitioners assert that certiorari should be granted on the issue of qualified immunity with respect to (a) the claim for denial of procedural due process in continued employment, (b) the claim for denial due process as to the liberty interest claim. However, the Tenth Circuit dismissed these claims. The issue of qualified immunity only comes into play on these claims if this court grants certiorari on plaintiff's petition, i.e. 91-29.

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[4] The cross petitioners make some reference to the issue of "taping" as showing no First Amendment activity. That issue, however, goes to the allegation of retaliation for communicating with defense counsel. These cross petitioners were granted qualified immunity with respect to that claim. That issue only applies to the City of Oklahoma City at the present time. That issue may become applicable to these defendants only if the court grants the petition for certiorari in plaintiff's case, i.e. 91-29.

Accordingly, the undersigned would submit that cross petitioners have not raised any independent basis for certiorari.

THE CROSS PETITIONERS HAVE NOT ASSERTED ANY BASIS TO GRANT THE CROSS PETITION ON THE ISSUE OF CAUSATION

Cross petitioners' final issue is that of causation. The only claim for which defendants in their individual capacity have liability at this time is on the First Amendment claim alleging retaliation for plaintiff's trial testimony.

At the outset it must be noted that cross petitioners did not preserve this matter below. That is, they neither submitted their own instruction on causation nor objected to the instructions given. They raised the issue for the first time on appeal. Therefore, they should not be permitted to urge this matter to the court[5].

The law is clear that if an individual defendant participates in, acquiesces in, or condones the deprivation of constitutional rights, then that individual properly held accountable, see e.g. *Rizzo v. Goode*, 423 U.S. 362 (1976), *McClelland v. Facteau*, 610 F.2d 693 (10th Cir. 1979), *Turpin v. Mailet*, 619 F.2d 196 (2nd Cir. 1980), *cert denied* 449 U.S. 1016 (1980).

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[5] In this regard, it should be noted that cross petitioners' assertion of an independent cause which breaks the causal connection was not even raised before the Tenth Circuit.

In these circumstances, it is respectfully submitted, the cross petitioner has failed to state a basis for this court granting certiorari.

CONCLUSION

Based on the foregoing, the undersigned would respectfully submit that the cross petition for certiorari in this case should be denied.

Respectfully submitted,

*Steven M. Angel
Law Offices of Steven M. Angel
50 Penn Place, Suite 825
Oklahoma City, OK 73118
(405) 848-0286

Carl D. Hughes
Hughes & Nelson
5801 N. Broadway Ext.
Suite 302
Oklahaoma City, OK 73118
(405) 848-0111
Attorneys for Respondent

*Counsel of Record